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Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CHILDREN'S INSTITUTE INTERNATIONAL,
KATHLEEN "KEE" MACFARLANE, CAPITAL CITIES/ABC, INC.
and WAYNE T. SATZ,
Petitioners,

v.

PEGGY MCMARTIN BUCKEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does malicious criminal prosecution support a claim under 42 U.S.C. § 1983 for violation of "substantive due process" rights?

2. Does malicious criminal prosecution support a claim under Section 1983 for violation of equal protection rights, where there is no allegation that the prosecution was undertaken because of the accused's membership in a discrete minority?

3. Does a finding by the California Municipal Court, after a full and fair preliminary hearing, that there was probable cause to prosecute a criminal defendant bar a subsequent claim under Section 1983 based on an alleged malicious prosecution?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court rule 28.1, petitioners list the following parent companies and non-wholly-owned subsidiaries:

For Petitioner Children's Institute International, Inc.: None

For Petitioner Kathleen "Kee" McFarlane: None

For Petitioner Capital Cities/ABC, Inc.:

English Sports, Inc.; ESPN Asia, Ltd.; ESPN 88; ESPN Enterprises, Inc.; ESPN, Inc.; New York Farm Show, Inc.; Starbird Satellite Services Ltd.; Transcontinental Television, Inc.; Worldwide Television News Corporation; Worldwide Television News France S.A.R.L.; Worldwide Television News GmbH; Worldwide Television News (U.K.) Ltd.

For Petitioner Wayne T. Satz: None

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Children's Institute International, Inc. ("CII"), Kathleen MacFarlane, Capital Cities/ABC, Inc. ("ABC"), and Wayne Satz hereby petition this Court to issue a writ of certiorari to review a decision of the Ninth Circuit Court of Appeals, issued July 1, 1992. Co-defendants County of Los Angeles, City of Manhattan Beach, and Robert Philibosian have filed a separate petition for review of the Ninth Circuit's decision.

Reversing a judgment of the District Court, the Ninth Circuit held that plaintiff Peggy McMartin Buckey could allege a claim under 42 U.S.C. § 1983 for alleged violations of substantive due process and equal protection rights based on allegations that Buckey was singled out for an allegedly unfounded criminal prosecution.

The Ninth Circuit's decision conflicts not only with decisions of several Circuit Courts, but also with decisions of this Court. In addition, the Ninth Circuit's opinion will open federal court doors

to every defendant acquitted in a criminal prosecution, notwithstanding the presence of constitutionally adequate procedural safeguards and prior state court findings of probable cause to proceed with a prosecution. Review by this Court is appropriate.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed February 19, 1992, is attached as Appendix A. An amended opinion of the Ninth Circuit was filed July 1, 1992, and is reported at 968 F.2d 791 (9th Cir. 1992). It is attached as Appendix B. The unpublished decision of the United States District Court for the Central District of California, entered September 28, 1990, is attached to this Petition as Appendix C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its original decision on February 19, 1992. Petitioners timely filed petitions for rehearing and suggestions for rehearing en banc. The Ninth Circuit filed an amended decision on July 1, 1992. This Petition for Writ of Certiorari was filed within 90 days of the filing of the Ninth Circuit's amended decision, and is therefore timely under 28 U.S.C. § 2101(c), and Supreme Court rule 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Section 1979 of the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the Untied States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This case arises from the widely-followed McMartin Preschool child molestation prosecution. Plaintiff Peggy McMartin Buckey, a co-owner of and teacher at the McMartin Preschool in Manhattan Beach, California, was arrested in 1984 after the Grand Jury found that there was sufficient evidence to convict her of crimes of child molestation. Represented by counsel, Buckey requested and received a preliminary hearing, the purpose of which, under California law, was to determine whether probable cause existed to prosecute her for the crimes charged. Buckey's preliminary hearing — the longest in California history — lasted eighteen months, after which the California Municipal Court ruled that there was probable cause to proceed with Buckey's prosecution.

After a trial that lasted almost three years, Buckey was acquitted on certain charges, and a mistrial was declared as to another in which the jury failed to reach a verdict. The District Attorney elected not to proceed with the charge as to which a mistrial had been declared.

Buckey then filed the instant lawsuit. Her complaint alleged that, based on the false report of an allegedly paranoid Preschool parent, the City set off a panic by sending letters to all Preschool parents alerting them to possible child abuse at the Preschool; that CII and McFarlane, having been retained by the City and

County to interview students of the Preschool and motivated by financial concerns, improperly interviewed the children and falsely reported that children had been abused; that the District Attorney, Philibosian, motivated by a desire for publicity, presented Buckey's name to the Grand Jury and that, thereafter, deputy district attorneys under his control misled the Grand Jury and the Municipal Court into finding that there was probable cause to believe Buckey had committed the crimes charged; and that ABC and its reporter, Satz, wanting to sell a sensational story, conspired in and encouraged the prosecution by extensively reporting on the City's and County's investigation and prosecution of plaintiff. *See* 968 F.2d at 792-93.

A. District Court Proceedings

Buckey filed her complaint on January 19, 1990, alleging a federal claim under Section 1983, as well as state law claims for common law conspiracy, malicious prosecution and defamation. On August 6, 1990, all petitioners except Satz (whom plaintiff had belatedly served and who had not yet responded to the complaint) moved to dismiss Buckey's complaint on the grounds that the Section 1983 claim failed to allege a constitutional injury, and that the state law claims lacked federal subject matter jurisdiction. On September 28, 1990, the District Court dismissed Buckey's Section 1983 claim with prejudice because "there is no way that Plaintiff can state a claim that her constitutionally protected rights were violated by any of the moving defendants." The District Court dismissed the state law claims without prejudice for lack of federal jurisdiction. Plaintiff and Satz then stipulated that the District Court's order should apply with the "same force and effect" to Satz as it applied to the other defendants for purposes of appeal.

B. Court of Appeals Proceedings

Buckey appealed the District Court's dismissal of her Section 1983 claim to the Court of Appeals for the Ninth Circuit. Buckey did not make any substantial argument that the District Court erred by dismissing her substantive due process claim, nor did her brief make any argument that her equal protection rights were

violated. Rather, Buckey's appeal focused almost exclusively on her purported procedural due process claim, and on her claim that she was unconstitutionally defamed.

The Ninth Circuit reversed the dismissal with prejudice of Buckey's substantive due process and equal protection claims without the benefit of briefing by the parties on the issues that it found controlling. With respect to Buckey's due process claim, the court held that, despite the fact that plaintiff "was afforded ample due process at the state level [and that] the preliminary hearing and trial cannot be faulted from a procedural point of view," plaintiff's allegations could state a claim for deprivation of "substantive due process rights." The court held that such a claim would be based on the allegation that "defendants, for their various reasons, conspired to attempt to send [Buckey] to jail for child molestation, in the course of which great injury was suffered by her." 968 F.2d at 794-95.

The Ninth Circuit purported to rely on its prior decision in *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc), which had held that allegations of a conspiracy between governmental and private parties to "distort[ ] and corrupt[ ] the processes of the law" supported a *procedural* due process claim. The Court ruled, however, that in light of recent Supreme Court authority, *Bretz* could no longer be viewed a procedural due process case (despite the fact that *Bretz* was "framed in the language of procedural due process [and had] been interpreted as a procedural due process case"), but, instead, would henceforth have to be considered a decision involving "equal protection or substantive due process." 968 F.2d at 794 and n.3. This ruling is in conflict with numerous decisions of this Court and the other Courts of Appeals.

With respect to the equal protection claim, the court did not require that the plaintiff allege "class-based" discrimination. Instead, the court held that allegations that defendants "conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered" stated a claim for denial of the equal protection of the laws. 968 F.2d at 794-95.

Unsupported by citation of case law, the court's equal protection holding quoted the legislative history of 42 U.S.C. § *1981*: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the security of persons and property, and shall be subject *to the like punishment, pains, and penalties, and to none other* . . . ." (emphasis added by the Ninth Circuit). Based solely on this quotation of legislative history, the court reasoned that the Equal Protection Clause is violated when a person does not receive the full benefit of legal "proceedings" enjoyed by other citizens, or is subject to a "punishment, pain, or penalty" by improper conduct of a government actor to which other citizens were not subjected. The Ninth Circuit neither distinguished, nor even acknowledged, numerous contrary decisions of other Circuits.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Erroneous Holding on Buckey's Substantive Due Process Claim Must Be Reviewed.

The Ninth Circuit's substantive due process[1] holding should be reviewed because it conflicts with decisions of this Court and the decisions of other Courts of Appeals. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 194, 109 S.Ct. 998, 1002 (1989) (certiorari is appropriate in light of the "inconsistent approaches taken by the lower courts in determining when, if ever, [alleged governmental misconduct]

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[1]Courts have used the term "substantive due process" to mean both extra-textual rights (such as the right to be free from undue governmental interference with a decision to have an abortion), as well as other express constitutional protections incorporated through the Fourteenth Amendment's Due Process Clause (such as the Eighth Amendment's right to be free from cruel and unusual punishment). *See Mann v. City of Tucson, Dept. of Police*, 782 F.2d 790, 796 (9th Cir. 1986) (Sneed, J., concurring); *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984). In discussing substantive due process in this case, the Ninth Circuit appears to have been referring to an extra-textual right to be free from certain government conduct.

constitutes a violation of the individual's [constitutional] rights, and the importance of the issue to the administration of state and local governments") (citation omitted).

In a nutshell, criminal law enforcement is a field blanketed with express procedural and substantive protections provided by federal and state law.[2] The question petitioners ask this Court to decide is whether, under the rationales of this Court's recent decisions in *Collins v. City of Harker Heights Tex.*, ____ U.S. ____, 112 S.Ct. 1061, 1071 (1992), and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989), federal courts may rely on

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[2]For example, the United States Constitution expressly affords criminal defendants the rights to be free from "unreasonable searches and seizures" (Fourth Amendment), to be free from being "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (Fifth Am.), to be free from being tried for the "same offense . . . twice" (Fifth Am.), to be free from being "compelled . . . to be a witness against himself" (Fifth Am.), to "a speedy and public trial" (Sixth Am.), to be tried by an "impartial jury" (Sixth Am.), to be tried in the "district wherein the crime shall have been committed" (Sixth Am.), "to be informed of the nature and cause of the accusation" (Sixth Am.), "to be confronted with witnesses against him" (Sixth Am.), "to have compulsory process for obtaining witnesses in his favor" (Sixth Am.), "to have the Assistance of Counsel for his defence" (Sixth Am.), to be free from "Excessive bail," "excessive fines," and "cruel and unusual punishments" (Eight Am.), and to be free from being deprived of "life, liberty, or property, without due process of law." (Fourteenth Am.)

At the time of the alleged misconduct in this case, California law further provided several additional procedural protections to make sure that criminal prosecutions were based on probable cause. California law provided that, in cases that proceeded by way of Grand Jury indictment, an indictment could be returned only after a finding that there was sufficient evidence to convict the defendant of the crimes charged. Cal. Pen. Code § 939.8. A criminal defendant could move to set aside the indictment if the indictment were not based on probable cause. Cal. Pen. Code § 995(a)(1)(b). Moreover, a post-indictment preliminary hearing was available to determine if probable cause existed to maintain the prosecution, and to "weed out" "unwarranted prosecutions" inspired "by malicious motives." *Jaffe v. Stone*, 18 Cal.2d 146, 150 114 P.2d 935 (1941).

"substantive due process" to fashion a remedy for alleged misconduct by state actors in the context of law enforcement, such as when a state actor is alleged to have brought an unfounded criminal prosecution.

This Court has previously ruled that where a state actor is alleged to have engaged in misconduct in violation of state law, the claim should be analyzed *only* to determine whether the alleged misconduct violates *procedural* due process, or an *express* substantive protection offered by another amendment (*e.g.*, the Fourth Amendment's protection against unreasonable searches and seizures, or the Eighth Amendment's protection against cruel and unusual punishments).[3] With one exception that has been substantially overruled,[4] this Court has not used "substantive due

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[3]In *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979), the Court held that an individual who was arrested pursuant to a facially valid warrant, but mistakenly kept in custody for three days despite repeated protests of mistaken identity, could not allege a due process violation, absent a showing that the *procedures* applicable to the individual's case had not met constitutional requirements. In *Hudson v. Palmer*, 468 U.S. 517, 532, 104 S.Ct. 3194, 3203 (1984), this Court expanded on *McCollan*'s reasoning by holding that, where prescribed procedures were adequate but not followed, if the government supplied an adequate post-deprivation remedy, no due process claim could be stated. In *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990), the Court held that *Hudson* applied to deprivations of liberty and analyzed an alleged liberty deprivation (six month's confinement in a psychiatric hospital without consent) as a procedural due process claim. *See also Ingraham v. Wright*, 430 U.S. 651, 674, 97 S.Ct. 1401, 1414 (1977) (analyzing claim based on school's decision "to punish a child for misconduct by restraining the child and inflicting appreciable physical pain" as procedural due process claim).

[4]In *Rochin v. California*, 342 U.S. 165, 174, 72 S.Ct. 205, 210-11 (1952), the Court held, in a case where state actors obtained evidence from a defendant by forcibly opening his mouth and pumping his stomach, that such conduct "shock[ed] the conscience" and that "the conviction [was] obtained by methods that offend the Due Process Clause." *Rochin*, however, was implicitly overruled by *Graham v. Connor*, 109 S.Ct. at 1871, to the extent that *Rochin* approved the application of a substantive due process analysis to alleged misconduct

process" to provide a remedy for instances of individualized misconduct by state actors in the context of law enforcement.[5] This Court's decision in *Graham v. Connor* is only the most recent in the long line of cases beginning with *Baker v. McCollan* and continued in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), that have abided by the foregoing analysis.[6]

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by government agents in seizing evidence. In *Graham*, this Court held: "Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force — deadly or not — in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.*

[5]This Court, to the extent it has recognized "substantive" due process claims, has generally interpreted the substantive component of the Due Process Clause only to limit what state *legislatures* can do, not to provide a remedy for alleged misconduct by individual state actors. *E.g., Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625 (1923) (invalidating state law prohibiting teaching of German in schools on the grounds that "liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect"); *Pierce v. Society of the Sisters et al.*, 268 U.S. 510, 534-36, 45 S.Ct. 571, 573-74 (1925) (holding state law prohibiting parents from sending children to private schools unconstitutional as an "arbitrary" infringement of the "liberty of parents and guardians to direct the upbringing and education of children"); *Griswold v. Connecticut*, 381 U.S. 479, 481-83, 85 S.Ct. 1678, 1680-81 (1965) (invalidating state law prohibiting use of birth control); *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1824 (1967) (finding unconstitutional statute prohibiting mixed racial marriages); *Carey v. Population Services Intern.*, 431 U.S. 678, 684-86, 97 S.Ct. 2010, 2015-17 (1977) (overturning state law prohibiting distribution of contraceptives to minors); *Foucha v. Louisiana*, 112 S.Ct. 1780, 1785-89 (1992) (holding unconstitutional state law allowing for continued confinement in mental institution until detainee could prove sanity); *Planned Parenthood of Southeastern Penn. v. Casey*, 112 S.Ct. 2791, 2804-08 (1992) (invalidating spousal consent requirement for abortions).

[6]*Graham* further stated that the analysis under Section 1983 "begins by identifying the specific constitutional right allegedly infringed," and held that, while the Fourth Amendment generally governs pre-arrest

There is good reason for a rule that conduct cannot form the basis for a "substantive" due process violation, where the conduct is "unauthorized" in the sense that it is not carried out pursuant to a state statute (and thus the conduct is not a reflection of state policy but, instead, contravenes well-defined state policy). *See also Parratt*, 101 S.Ct. at 1916-17 (finding no due process violation where "the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established state procedure."). The essential inquiry in a substantive due process analysis has been to examine whether the state, in making a *policy* decision, has a sufficient interest to justify invading a protected liberty interest.[7] When state actors are alleged to have breached duties under state law (such as by bringing a baseless prosecution), the federal constitution and state law have already prescribed adequate protections to safeguard the individual's due process interests, and federal courts do not need to use substantive due process to "bar" a state from doing what the state is already barred from doing. *See Collins v. City of Harker Heights Tex.*, 112 S.Ct. at 1071 (holding that substantive due process did not provide a remedy to the widow of a state worker for the state's alleged indifference to the worker's safety resulting in the worker's death, because the field already was

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conduct and the Eighth Amendment governs post-arrest "punitive" conduct, substantive due process may not be used to fill in gaps between coverage provided by constitutional amendments. 109 S.Ct. at 1870 and n.10; *see Bell v. Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861 (1979) (holding that pretrial detainee cannot be punished unless the detainee has received *procedural* due process protections).

[7] *E.g., Pierce v. Society of Sisters*, 45 S.Ct. at 571 (overturning state prohibition on private schools because law has "no reasonable relation to some purpose within the competency of the state"); *see also Washington v. Harper*, 494 U.S. 210, 220, 110 S.Ct. 1028, 1036 (1990) (holding, in a case involving a law permitting the administration of antipsychotic drugs against prisoner's will, that "the substantive issue involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it").

covered by other law); *cf. Daniels v. Williams*, 474 U.S. 327, 331-32, 106 S.Ct. 662, 665-66 (1986) (noting that due process "bar[s] certain *government* actions regardless of the fairness of the procedures used to implement them" (emphasis added)).

Breaking new ground, the Ninth Circuit has seen fit in this case to provide a "substantive due process" remedy, even though the state itself already provided a pre-deprivation hearing to prevent the alleged injury, and a post-deprivation remedy in the form of a tort claim. Indeed, the Ninth Circuit expressly disclaimed any intention to base its analysis on procedural due process, stating:

> "Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view."

968 F.2d at 795. Moreover, rather than grounding its holding in the express protection of some specific constitutional right, the Ninth Circuit instead ruled that Buckey could state a claim for violation of her "substantive due process rights"[8] based on an amorphous, non-textual right to be free from the alleged "conspir[acy] to attempt to send her to jail for child molestation." 968 F.2d at 794.[9]

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[8]It appears that the Ninth Circuit felt compelled to rely on substantive due process in *Buckey* because California's pre-deprivation hearing and post-deprivation remedy alleviated any procedural due process concerns.

[9]The Ninth Circuit's decision also conflicts with "substantive" due process decisions of this Court which have recognized absolutely protected liberty interests in only two specific areas. In *Planned Parenthood v. Casey*, ____ U.S. ____, 112 S.Ct. 2791, 2806-07 (1992), this Court summarized the cases as providing "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education, . . . as well as [to] bodily integrity." Although the decisions summarized in *Planned Parenthood* might not properly be viewed as creating "substantive" due process rights (but instead might be viewed as decisions implicating other amendments), to the extent they have recognized fundamental rights protected by substantive due process guarantees, they have recognized those rights only in narrowly

Virtually all prior Circuit Court decisions have focused their analyses on whether an alleged malicious prosecution violates the accused's procedural due process rights or substantive rights protected by another amendment. Even within that analysis, the Courts have fractured significantly in their holdings. Some hold that malicious prosecution does not implicate procedural due process concerns at all because the Fourteenth Amendment does not require that criminal prosecutions be based on probable cause[10]; others appear to reach a contrary conclusion that malicious prosecution violates the accused's procedural due process rights regardless whether the state provides a post-

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circumscribed areas not expressly reached by other amendments. This Court has never held that a liberty interest absolutely protected by substantive due process guarantees entitles individuals to "uncorrupted" and "undistorted" judicial processes. Indeed, this Court has exhibited extreme reluctance to create new areas of absolutely protected liberty interests. *See Collins*, 112 S.Ct. at 1071 (rejecting proposed substantive due process right to receive adequate employment training). The Ninth Circuit, by recognizing a new fundamental right, has disregarded the Supreme Court's approach in this area.

[10]*See Gunderson v. Schlueter*, 904 F.2d 407, 409 (8th Cir. 1990) (rejecting a due process claim because "[t]he Constitution does not mention malicious prosecution, nor has [plaintiff] cited a case or statute establishing a federal action for malicious prosecution. In fact, this and other circuits are uniform in holding that malicious prosecution by itself is not punishable under section 1983 because it does not allege a constitutional injury"); *Coogan v. City of Wixom*, 820 F.2d 170, 174-75 (6th Cir. 1987) ("Even if plaintiff had been able to establish all the elements for a claim of malicious prosecution, his proper avenue of relief was the state tort action only, not a claim under § 1983"); *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985) ("the common law tort of malicious prosecution does not give rise to a federal constitutional wrong remedied by 42 U.S.C. § 1983. Parties who have suffered tortious injury are not entitled to § 1983 relief merely because of the fact that the defendant is a governmental official"); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981) ("The § 1983 claim for malicious prosecution and abuse of process was also properly rejected. A valid cause of action under § 1983 is not alleged simply by the assertion that a common law tort was committed by a state official").

deprivation remedy[11]; and still others hold that malicious prosecution would violate procedural due process, but for the availability of a post-deprivation remedy.[12] Thus, the Circuit Courts were split three ways even before the Ninth Circuit's holding, but the Ninth Circuit has now aggravated the disagreement by holding that malicious prosecution violates *substantive* due process when "corruptions and distortions" of the "judicial processes" are alleged.[13]

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[11]*See Jennings v. Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977) (holding that "an abuse of process [i.e., the initiation of prosecution for an improper purpose] is by definition a denial of procedural due process"); *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988) (holding that "bad faith prosecution violates constitutional rights" because the Fourteenth Amendment "imposes a duty on state prosecutors to charge only upon ascertaining probable cause"); *Strength v. Hubert*, 854 F.2d 421, 426 (11th Cir. 1988) (relying on *Hand v. Gary* and holding that due process guarantees "the right to be free of malicious prosecution"). *See also Brummett v. Camble*, 946 F.2d 1178, 1180 and n.2 (5th Cir. 1991) *cert. denied* 112 S.Ct. 2323 (1992) ("malicious prosecution can form the basis of a § 1983 claim").

[12]*Johnson v. Barker*, 799 F.2d 1396, 1400 (9th Cir. 1986) ("malicious prosecution does not ordinarily constitute a valid procedural due process claim if process is available within the state judicial system to remedy such wrongs"); *Bacon v. Patera*, 772 F.2d 259, 264 (6th Cir. 1985) ("if [defendant's] actions were only 'random and unauthorized [citing *Hudson v. Palmer*], Bacon would then have to show that state remedies are inadequate"); *Norton v. Liddel*, 620 F.2d 1375, 1378 (10th Cir. 1980) ("We do not believe that the Fourteenth Amendment or the Civil Rights Act were designed to redress injuries incurred by reason of unfounded or malicious claims/suits brought in State court, where adequate State remedies are available to the aggrieved parties").

[13]Some courts, purporting to rely on language from *Rochin v. California*, have theorized that "conscience shocking" conduct by the government in the context of an allegedly malicious prosecution could violate substantive due process. *See Gunderson v. Schlueter*, 904 F.2d at 409-10 (stating that, for an alleged malicious prosecution to support a Section 1983 claim, the plaintiff could allege either that appropriate procedures were not followed, or conduct that "shocks the conscience"); *Torres v. Superintendent*, 893 F.2d 404, 410 (1st Cir. 1990) ("[f]or

The conflict between the Ninth Circuit's *Buckey* decision and the approaches of other Circuit Courts is exemplified by a comparison of *Buckey* and *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 410-11 (1st Cir. 1990). In *Torres*, a group of former police officers alleged that other members of the police department conspired to frame them on criminal charges and that, by presenting false testimony, the defendants fraudulently procured a finding of probable cause at a preliminary hearing. The First Circuit held that "[f]or procedural due process purposes in a claim of malicious prosecution, the plaintiff must show the alleged conduct deprived him of liberty by distortion and corruption of the processes of law, *i.e.*, corruption of witnesses, falsification of evidence, or some other egregious conduct resulting in a denial of a fair trial. [Citations omitted.]" *Id.* Thus, the First Circuit in *Torres* held that precisely the sort of alleged conduct at issue in *Bretz* and in this case should be analyzed for violations of *procedural* due process, which it found lacking because of the adequacy of a post-deprivation remedy for malicious prosecution available under Puerto Rico law. *Id.* In contrast, the Ninth Circuit found a substantive due process violation

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substantive due process purposes, the alleged malicious prosecution must be conscience-shocking"); *Barnier v. Szentmiklosi*, 810 F.2d 594, 599-600 (6th Cir. 1987) (theorizing that a plaintiff could allege a substantive due process violation if the conduct at issue was "conscience shocking"); *Johnson v. Barker*, 799 F.2d at 1400 (holding that the conduct at issue "was [not] so egregious as to 'shock the conscience.' "). Most of these courts have found that "conscience-shocking" cannot be found in the absence of physical brutality or racial motivations. *E.g.*, *Torres*, 893 F.2d at 410 (summarizing that "[w]here plaintiff has not been physically abused, detained, or prosecuted due to racial or political motivation . . . courts are reluctant to find 'conscience-shocking' conduct"). Petitioners submit that each of these decisions, to the extent each theorizes that a substantive due process claim could exist, is in conflict with the restrictions on substantive due process claims imposed by this Court, as discussed above. *See also Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) ("After *Graham*, the status of the 'shock the conscience' test in contexts other than allegations of excessive force is uncertain"). In any event, however, none of these courts has found a substantive due process violation based on an allegedly "conscious-shocking" malicious prosecution.

despite the existence of a pre-deprivation hearing and a post-deprivation remedy.

The Ninth Circuit's *Buckey* decision should be reviewed for reasons wholly apart from the benefit of resolving the manifest conflict among the Circuit Courts.[14] First, the decision leaves the parties in this case without any way of knowing the elements of the Ninth Circuit's new substantive due process claim. The court's decision appears to hold that the Fourteenth Amendment is violated when (a) there is a conspiracy between private parties and the government, which causes (b) a "corruption" and (c) a "distortion" of (d) the "processes of law." The parties have no way of knowing what constitutes a corruption or a distortion, and which processes of law must be corrupted or distorted for a claim to be proved. Unless these issues are addressed by state law or by some other constitutional amendment (a proposition that the Ninth Circuit, by affirming the dismissal of the procedural due process claim, implicitly rejected), there is no way to know what the elements of the claim are.

In light of the foregoing, the Ninth Circuit's decision has tremendous implications for the district courts. Under the Ninth Circuit's analysis, the federal courts will be called upon to define on a case by case basis the elements of "corruption," "distortion," and "processes of law." Their decisions will be unbounded by any constitutional text or other relevant guideposts. Rather, each judge will decide whether a plaintiff has alleged sufficient facts to constitute a "corruption" or a "distortion" of some arbitrarily-determined "judicial processes." The Ninth Circuit's creation of a novel substantive due process claim is unworkable.[15]

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[14]Assuming this Court resolves the split created by the Ninth Circuit's ruling on the substantive due process issue, it should take the further step to resolve the three-way split as to whether malicious prosecution violates procedural due process. *See Camble v. Brummett*, 112 S.Ct. 2323, 2324 (1992) (White, J., dissenting from the denial of certiorari) ("I would grant certiorari to determine if a cause of action for malicious prosecution is available under section 1983").

[15]Notably, the few Circuits that have speculated the malicious prosecution could violate substantive due process if it "shocks the con-

Moreover, the Ninth Circuit's holding should be reviewed for the additional reason that it has the potential to turn every malicious prosecution claim into a Section 1983 action. Under the Ninth Circuit's decision, every criminal defendant who is acquitted can now get past the pleading stage in a federal court civil rights action by alleging that he was the victim of a conspiracy "to attempt to send [him] to jail . . . ." *See* 968 F.2d at 794. Plaintiffs will always allege that prosecutors who interview witnesses before trial have "conspired" to "corrupt" the witnesses' testimony. The Ninth Circuit's decision threatens to chill the vigor with which difficult or controversial criminal prosecutions will be pursued, and to inundate federal courts with claims adequately addressed under state law.

B. This Court Should Correct The Ninth Circuit's Erroneous Holding on Buckey's Equal Protection Claim.

This Court should review the Ninth Circuit's equal protection holding because it runs contrary to decisions of this Court, squarely conflicts with decisions of other federal Circuit Courts of Appeals, and has the potential to turn virtually every purported malicious prosecution claim into a Section 1983 claim.

The Ninth Circuit did not require as an element of plaintiff's equal protection claim that she allege her membership in a discrete minority, or that the defendants' alleged wrongs were

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science" have not applied a uniform analysis based on objective criteria. *See, e.g., Barnier*, 810 F.2d at 599. The only court that tried to apply some objective boundaries to the "shocks the conscience" test, *Torres v. Superintendent*, essentially held that the hypothesized substantive due process claim was unnecessary. In *Torres*, the First Circuit noted that malicious prosecution would only be "conscience-shocking" if it involved (a) physical brutality, (b) racial motivation, or (c) political motivation. 893 F.2d at 410. These circumstances would likely all be covered by other express constitutional protections — under *Graham*, physical violence in the course of a prosecution would be analyzed under the Fourth Amendment or the Eighth Amendment; a racially-motivated prosecution would be analyzed as a denial of equal protection; and a prosecution aimed to silence a political viewpoint would run afoul of the First Amendment.

motivated by her membership in *any* class; indeed the complaint contained no such allegations. The court's holding that plaintiff stated an equal protection claim is therefore in conflict with a number of this Court's decisions. *See DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. at 1004 and n.3 (holding that the state's failure to provide protective services to a specific individual did not violate equal protection guarantees so long as the state did not "selectively deny its protective services to certain disfavored minorities"); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 563-64 and nn.10-13, and 566 and n.21 (1977) (requiring proof of *invidious* discrimination to establish equal protection violation, and interpreting "invidious" purpose to include intent to discriminate on basis of race); *Paul v. Davis*, 424 U.S. 693, 700, 96 S.Ct. 1155, 1160 (1976) (holding that a government actor's intent to injure a person does not necessarily mean that the victim "is deprived of any right protected or secured by the Constitution or laws of the United States"). *Cf. Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 2028 and n.5 (1987) (holding that 42 U.S.C. § 1981 precludes discrimination based on ethnicity, race, and ancestry).

The general rule followed by this Court has been that, to state an equal protection claim, a plaintiff must *at least* allege class-based discrimination. *See also United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 850, 103 S.Ct. 3352 (1983) (Blackmun, J., dissenting) ("[T]he intended victims must be victims not because of any personal malice the conspirators have toward them, but because of their membership in or affiliation with a particular class. Moreover, the class must exist independently of the defendants' actions; that is, it cannot be defined simply as the group of victims of the tortious action."); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439-41, 105 S.Ct. 3249, 3254-55 (1985) (holding that a statute that discriminates on its face against mentally handicapped people without sufficient justification violates the equal protection clause); *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 1073 (1886) (holding that a law that is neutral on its face but applied in a manner to discriminate against an individual because of ancestry without sufficient justification, violates the equal

protection clause). The Ninth Circuit's decision conflicts with these decisions of this Court because it purports to allow Buckey to state an equal protection claim without requiring any allegation that the alleged "invidious" discrimination was motivated by a class-based animus.

For the same reason, the Ninth Circuit's decision squarely conflicts with decisions of the Courts of Appeals for the Second, Fifth, Sixth and Seventh Circuits, which have held that, in order to state a claim under the Equal Protection Clause based on improper government conduct, a person must at least allege that he was mistreated because of his membership in a discrete class. For example, in *Huebschen v. Dept. of Health & Social Services*, 716 F.2d 1167, 1170-72 (7th Cir. 1983), the plaintiff alleged that he had been denied equal protection when he was fired from his government job. The Seventh Circuit Court of Appeals dismissed the equal protection claim because the plaintiff "merely alleged that he was treated unfairly as an individual" and failed to allege "intentional discrimination against him because of his membership in a particular class." The court summarized: "we simply are not persuaded that the Equal Protection Clause should protect . . . a class [defined as the victims of allegedly wrongful conduct by a state actor]." *Id.* at 1172.[16]

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[16]*See also Rattner v. Netburn*, 733 F.Supp. 162, 163-64 (S.D.N.Y. 1989) (holding that an equal protection claim was not stated where the plaintiff failed to show he was discriminated against because of his membership in discrete class), *aff'd in part and vacated in part*, 930 F.2d 204 (2d Cir. 1991) (affirming dismissal of equal protection claim); *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class"); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978) (rejecting claim that corporate landowners were "denied the equal protection of the law in their right to follow orderly procedures promulgated with regard to the approval of land use" where state actors allegedly maliciously used state legal procedures to harass plaintiffs); *Bacon v. Patera*, 772 F.2d 259, 264 (6th Cir. 1985) (holding that for security guard to state a constitutional claim based on alleged malicious prosecution, plaintiff had to allege that defendant had an established procedure of targeting security officers

The Ninth Circuit's equal protection holding should be reviewed because of the conflict in the Circuits that it creates. Moreover, the holding threatens to provide a federal court lawsuit to all criminal defendants who are acquitted, as any defendant who is made to stand trial can allege that he was singled out to be maliciously prosecuted and thereby denied "the full and equal benefit of all laws and proceedings . . . ." 968 F.2d at 795.

C. The Ninth Circuit's Failure To Accord Collateral Estoppel Effect To The State Court's Probable Cause Finding Requires Reversal.

The Ninth Circuit *sub silentio* rejected the argument that the Municipal Court's finding of probable cause after a full and fair preliminary hearing forecloses Buckey's Section 1983 claim. While this Court has not yet ruled on the precise issue raised here, the most analogous decision, *Allen v. McCurry*, 449 U.S. 90, 94-96, 103-04, 191 S.Ct. 411 (1980), appears to be in conflict. In *Allen*, this Court held that state law governs whether a state court finding is given collateral estoppel effect in a Section 1983 action. The Court also held that if the state would give a decision of its criminal courts collateral estoppel effect, then the decision that would have "binding effect" in a Section 1983 claim when the "state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights." *Id.* at 420. The Ninth Circuit's holding is in conflict with *Allen*, because it fails even to analyze whether, under California law, the Municipal Court's finding precludes Buckey's malicious prosecution claim. Had it engaged in the appropriate analysis, the

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generally for unlawful conduct "to harass them and force them out of business"); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) (holding that, "to assert a constitutional claim based on violation of equal protection, a complaining party must assert disparate treatment based upon their membership in a particular group"); *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1305 and n.10 (9th Cir. 1989) (holding that allegations of theft and fraud by court appointed receiver do not support a claim for violation of the victim's equal protection rights).

Ninth Circuit would have had to rule that the probable cause finding at the preliminary hearing barred Buckey's claim.

The general rule under California law is that a decision in a criminal proceeding cannot be collaterally attacked. Buckey's principal argument against application of collateral estoppel was that, because of the alleged presentation of false evidence, she was denied a full and fair opportunity to litigate the probable cause issue at her preliminary hearing. Under California law, however, a litigant cannot seek to relitigate a judicial finding by claiming that false evidence was presented. *See Kachig v. Boothe*, 22 Cal.App.3d 626, 637, 99 Cal.Rptr. 393 (1971) ("[i]f it were permitted that a litigant could maintain an action to overthrow a judgment upon the ground that perjured testimony had been employed against him, or upon any other ground than extrinsic fraud, litigation would have no end"); *accord Eichman v. Fotomat Corp.*, 147 Cal.App.3d 1170, 1176, 197 Cal.Rptr. 612 (1983). Indeed, it would defy fundamental principles of judicial efficiency and finality to permit Buckey to recall each witness, including numerous children, who testified at her eighteen-month preliminary hearing, and again to cross-examine each to determine whether each witness had been telling the truth or had, instead, given perjured testimony.

The Ninth Circuit's refusal to accord collateral estoppel effect to the Municipal Court's probable cause finding is also in conflict with decisions of the First, Sixth, Seventh, and Eighth Circuits, all of which accord binding effect to state laws holding that a probable cause finding is given collateral estoppel effect; those Courts have accordingly held that such a finding bars a subsequent federal court claim based on a lack of probable cause. In *Torres v. Superintendent*, 893 F.2d at 411 and n.11, the First Circuit held that even if no post-deprivation remedy existed and a due process claim could therefore be stated, a finding of probable cause by the state court in the criminal action would bar the claim. In *Coogan v. City of Wixom*, 820 F.2d at 175, the Sixth Circuit held that a judicial finding of probable cause at a preliminary hearing, after the accused not only had a "full and fair opportunity" under state law to litigate the issue of probable cause but, in fact, litigated the issue, "foreclose[s] relitigation of that

finding in a subsequent § 1983 action." In *Guenther v. Holmgreen*, 738 F.2d 879 (7th Cir. 1984), *cert. denied*, 469 U.S. 1212, 105 S.Ct. 1182 (1985), the Seventh Circuit held that where a criminal defendant litigates at a preliminary hearing the issue of probable cause for an arrest, a finding of probable cause bars a subsequent civil rights claim based on an alleged malicious prosecution. In *Gunderson v. Schlueter*, 904 F.2d at 409, the Eighth Circuit affirmed the dismissal of a Section 1983 claim purportedly based on an alleged malicious prosecution, where the state court judge "in good faith found probable cause, a finding later confirmed in a pre-trial hearing."[17]

This Court should review the Ninth Circuit's collateral estoppel holding not only because it conflicts with decisions of other Circuits, but because of its practical implications on this case. The decision, which appears to allow for relitigation of the state court's probable cause finding, will require the re-cross-examination of numerous child witnesses to determine if they were telling the truth at Buckey's preliminary hearing and trial.

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[17] *See also McCarthy v. Mayo*, 827 F.2d 1310, 1316-17 (9th Cir. 1987) (holding that a Grand Jury finding of probable cause for an indictment barred a later state law malicious prosecution claim and, apparently, a federal Section 1983 claim as well); *McGowan v. City of San Diego*, 208 Cal.App.3d 890, 896, 256 Cal.Rptr. 537 (1989), *review denied* (relying on *Guenther* and holding that a criminal defendant's unsuccessful motion to suppress alleging lack of probable cause to arrest precluded the defendant's subsequent civil claim, because the "probable cause in the criminal proceeding is identical to the probable cause required in a later civil complaint"). *Cf. Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989) (holding that, because a "John Doe proceeding" under Wisconsin law is not intended to determine whether in fact probable cause for a prosecution exists, but, instead, whether there is sufficient evidence for a finding of probable cause, a finding against the accused at the John Doe proceeding would not foreclose a later Section 1983 action).

CONCLUSION

Petitioners respectfully submit that their Petition for Writ of Certiorari should be granted.

Respectfully, submitted,

September 28, 1992

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No. 90-56333.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT.

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILIBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

Argued and Submitted Nov. 7, 1991,
Decided Feb. 19, 1992.

Teacher acquitted in highly publicized child molestation case brought § 1983 action against city, county, county district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter, alleging that policies and actions of these defendants deprived her of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment. Defendants moved to dismiss. The United States District Court, Central District of California, Richard A. Gadbois, Jr., J., granted motion, denying leave to amend. Teacher appealed. The Court of Appeals, Sneed Circuit Judge, held that: (1) complaint which alleged that defendants had improper motives for pursuing child molestation case failed to state cause of action under § 1983, and (2) teacher was granted opportunity to amend pleadings in light of possibility that she could assert claim that defendants conspired under color of state law to subject her to hardships and injuries which she suffered in violation of substantive due process and equal protection.

Reversed and remanded.

1. *Federal Courts — 776*

Dismissal for failure to state claim is ruling on question of law and as such is reviewed de novo. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

2. *Federal Civil Procedure — 1829*

Review of dismissal for failure to state claim is based on contents of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. *Federal Civil Procedure — 1829*

In reviewing dismissal for failure to state claim, all allegations of material fact are taken as true and construed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

4. *Civil Rights — 234*

Civil rights complaints are to be liberally construed. 42 U.S.C.A. § 1983.

5. *Civil Rights — 235(5)*

Complaint which alleged that city, county, county district attorney, child abuse investigator, television company, and television reporter had improper motives for pursuing child molestation case against preschool teacher and that she was deprived of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment failed to state cause of action under § 1983. U.S.C.A. Const.Amends. 5, 6, 14; 42 U.S.C.A. § 1983.

6. *Civil Rights — 110*

Mere negligence and self-aggrandizing motives are not actionable under § 1983, 42 U.S.C.A. § 1983.

7. *Federal Civil Procedure — 839*

Preschool teacher acquitted in highly publicized child molestation case was granted opportunity to amend her pleadings in light of possibility that she could assert claim under § 1983 that city, county, district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter conspired under color of state law to subject her to hardships and injuries which she suffered in violation of substantive due process

and equal protection. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. *Civil Rights — 115*

Business and reputation losses alone do not constitute "plus" that is required to transform ordinary defamation claim into § 1983 claim. 42 U.S.C.A. § 1983.

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Appeal from the United States District Court for the Central District of California.

Before SNEED, BEEZER and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a waive of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in

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[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under Fed.R.Civ.P. Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice

II.

JURISDICTION AND STANDARD OF REVIEW

[1-4] We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). Review is based on the contents of the complaint. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir.1989).

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[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

III.

ANALYSIS

[5, 6] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon,* 712 F.2d 1524, 1526 (1st Cir.1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under section 1983. *Daniels v. Williams,* 474 U.S. 327, 333, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986); *see, e.g., Johnson v. Barker,* 799 F.2d 1396, 1400 (9th Cir.1986) (alleged politically motivated prosecution did not give rise to valid § 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King,* 883 F.2d 819, 821 (9th Cir.1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[7] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim ethically and professionally can be filed. We only indicate that it is a possibility.

This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police,* 782 F.2d 790, 798 (9th Cir.1986) (Sneed, J., concurring in the result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be

irrelevant. *Zinermon v. Burch,* 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990); *Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951, 957 (9th Cir.1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir.1985) (en banc),[3] would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws and *proceedings* for the security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other. . . .*" (Emphasis added)).

Buckey, to repeat, was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[8] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Business and reputation losses alone do

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[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.,* and the case has been interpreted as a procedural due process case, *see, e.g., Johnson v. Barker,* 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon's* three-prong typology of § 1983 due process claims, 494 U.S. at 125-26, 110 S.Ct. at 983, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik*, 924 F.2d 1520, 1534 (9th Cir.1991), *reh'g en banc ordered*, 933 F.2d 798 (9th Cir.1991). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint.

REVERSED and REMANDED.

No. 90-56333.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

PEGGY MCMARTIN BUCKEY,
Plaintiff-Appellant

v.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILIBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; WAYNE T. SATZ; CAPITAL CITIES/ ABC, INC.; KATHLEEN "KEE" MACFARLANE,
Defendants-Appellees.

Argued and Submitted Nov. 7, 1991.
Decided Feb. 19, 1992.

As Amended on Denial of Rehearing and Rehearing En Banc July 1, 1992.

Teacher acquitted in highly publicized child molestation case brought § 1983 action against city, county, county district attorney, child abuse investigation institute, child abuse investigator, television reporter, alleging that policies and actions of these defendants deprived her of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment. Defendants moved to dismiss. The United States District Court, Central District of California, Richard A. Gadbois, Jr., J., granted motion, denying leave to amend. Teacher appealed. The Court of Appeals, Sneed, Circuit Judge, held that: (1) complaint which alleged that defendants had improper motives for pursuing child molestation case failed to state cause of action under § 1983, and (2) teacher was granted opportunity to amend pleadings in light of possibility that she could assert claim that defendants conspired under color of state law to subject her to hardships and injuries which she suffered in violation of substantive due process and equal protection.

Reversed and remanded.

Opinion, 957 F.2d 652, superseded.

1. *Federal Courts — 776*

Dismissal for failure to state claim is ruling on question of law and as such is reviewed de novo. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

2. *Federal Civil Procedure — 1829*

Review of dismissal for failure to state claim is based on contents of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. *Federal Civil Procedure — 1829*

In reviewing dismissal for failure to state claim, all allegations of material fact are taken as true and construed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 12(b)(6) 28 U.S.C.A.

4. *Civil Rights — 234*

Civil rights complaints are to be liberally construed. 42 U.S.C.A. § 1983.

5. *Civil Rights — 235(5)*

Complaint which alleged that city, county, county district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter had improper motives for pursuing child molestation case against preschool teacher and that she was deprived of her rights to due process, privacy, equal protection, and fair trial contrary to Fourteenth Amendment failed to state cause of action under § 1983. U.S.C.A. Const.Amends. 5, 6, 14; 42 U.S.C.A. § 1983.

6. *Civil Rights — 110*

Mere negligence and self-aggrandizing motives are not actionable under § 1983. 42 U.S.C.A. § 1983.

7. *Federal Civil Procedure — 839*

Preschool teacher acquitted in highly publicized child molestation case was granted opportunity to amend her pleadings in light of possibility that she could assert claim under § 1983 that city, county, district attorney, child abuse investigation institute, child abuse investigator, television company, and television reporter conspired under color of state law to subject her to hardships and injuries which she suffered in violation and substantive due process and equal protection. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

8. *Civil Rights — 115*

Business and reputation losses alone do not constitute "plus" that is required to transform ordinary defamation claim into § 1983 claim. 42 U.S.C.A. § 1983.

William H. Waysman, James H. Davis, Los Angeles, Cal., for plaintiff-appellant.

Roger H. Granbo, Deputy County Counsel, Los Angeles, Cal., Jeffrey L. Garland, Cotkin, Collins & Franscell, Santa Ana, Cal., Charles P. Diamond, O'Melveny & Meyers, Gregory J. Aldisert, Philip W. Boesch, Jr., Kinsella, Boesch, Fujikawa & Towle, Mark B. Helm, Munger, Tolles & Olson, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before: SNEED, BEEZER, and THOMPSON, Circuit Judges.

SNEED, Circuit Judge:

Peggy McMartin Buckey, acquitted in the highly publicized McMartin Preschool child molestation case, appeals the dismissal with prejudice of her 42 U.S.C. § 1983 action against the City of Manhattan Beach, Los Angeles County, Robert Philibosian, Los Angeles County District Attorney, Children's Institute International (CII), child abuse investigation specialists, Kathleen "Kee" MacFarlane, CII investigative social worker, television

company Capital Cities/ABC, Inc., and ABC reporter Wayne T. Satz. Buckey alleges, in effect, that but for the policies and actions of the defendants, her life would not have been ruined by the McMartin Preschool prosecution. The trial court found that there was no possible theory under which Buckey's allegations could amount to a cognizable claim. We reverse and remand to allow Buckey to amend her pleadings.

I.

FACTS AND PROCEEDINGS BELOW

The facts, as set forth in Buckey's complaint, are as follows: Buckey co-owned and taught at the highly regarded Virginia McMartin Preschool in Manhattan Beach, California. In 1983, a person known to be paranoid and otherwise mentally ill alleged to the Manhattan Beach police that her child had been sexually molested while attending the McMartin Preschool. The police sent letters to all McMartin Preschool parents, which resulted in a wave of unfounded abuse allegations. The ensuing city and county investigation was improperly delegated to CII, with Kee MacFarlane as principal investigator. MacFarlane had no relevant academic, professional, or technical licenses or credentials. CII and MacFarlane proceeded seriously to mishandle the investigation, so as to violate established guidelines for child abuse investigation and to cause the children to fabricate testimony and fantasize experiences of abuse that had never occurred. The County, acting through Philibosian, accepted the CII investigation as basis for launching a prosecution against Buckey and others. Meanwhile, MacFarlane leaked the story to Satz at ABC, where it was disseminated to the public.

Buckey alleges that several defendants had improper motives that led them to pursue the McMartin case despite the lack of factual foundation for doing so. CII needed to unearth a scandal to save its business from bankruptcy. Philibosian needed ammunition for an upcoming election battle. Capital Cities/ABC wanted to sell a sensational story, and was willing to go beyond the

bounds of responsible journalism to do so.[1] In other words, Capital Cities/ABC created rather than simply reported the news.

After her acquittal on all criminal charges, Buckey brought this action in federal district court. She alleged section 1983 violations and pendent state law claims, and sought upwards of $1 million in damages. Her complaint stated that, without limitation, she was deprived of her rights to due process, privacy, equal protection, and a fair trial contrary to the Fourteenth Amendment. The defendants moved to dismiss under Fed.R.Civ.P.Rule 12(b)(6) for failure to state a claim.[2] The trial court observed that the preliminary hearing that led to Buckey's being bound over for criminal trial had lasted 18 months. This indicated that the prosecution had probable cause for proceeding with the McMartin criminal case. The court further noted that Buckey had been acquitted, and so could not complain she had not received a fair trial. Finally, the court expressed its sympathy that Buckey was properly "very, very upset" by what had happened to her, but stated that "being very, very upset does not state a cause of action under [section] 1983." The court dismissed Buckey's section 1983 action with prejudice, denying leave to amend, and dismissed the pendent state law claims without prejudice.

II.

JURISDICTION AND STANDARD OF REVIEW

[1-4] We have jurisdiction pursuant to 28 U.S.C. § 1291. A dismissal for failure to state a claim is a ruling on a question of law and as such is reviewed de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, 496

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[1]Buckey's complaint alleges a conspiracy among the City, County, CII, MacFarlane, Satz, and ABC to disclose the McMartin affair prior to Buckey's indictment. A romantic liaison between MacFarlane and Satz is asserted in Buckey's appellate brief, but not in her complaint.

[2]Defendant Satz did not appear at the hearing on the motions to dismiss. By stipulation of the parties, the motions to dismiss apply with the same force and effect as to Satz as to the other defendants.

U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). Review is based on the contents of the complaint. *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir.1989). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Id.* (quotation omitted). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Id.* Civil rights complaints are to be liberally construed. *Gobel v. Maricopa County,* 867 F.2d 1201, 1203 (9th Cir.1989).

III.

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[5, 6] Buckey's vague and conclusory complaint "aims in the general direction of the federal Constitution with buckshot." *Chiplin Enter. v. City of Lebanon,* 712 F.2d 1524, 1526 (1st Cir.1983). It describes her misfortunes and the persons she believed caused them, but in no way does Buckey adequately plead injuries cognizable under section 1983. Mere negligence and self-aggrandizing motives are not actionable under section 1983. *Daniels v. Williams,* 474 U.S. 327, 333, 106 S.Ct. 662, 666, 88 L.Ed.2d 662 (1986); *see, e.g., Johnson v. Barker,* 799 F.2d 1396, 1400 (9th Cir.1986) (alleged politically motivated prosecution did not give rise to valid § 1983 due process claim). Nor does the complaint allege specific facts to support the existence of a conspiracy among the defendants. *See Burns v. County of King,* 883 F.2d 819, 821 (9th Cir.1989). As it stands, Buckey's complaint cannot survive a motion to dismiss. The only issue we confront is whether we should remand to permit Buckey to amend her pleadings.

[7] We would be justified in doing this only if there is a distinct claim cognizable in a federal court and consistent with the facts and allegations set forth in her complaint that she might plead. We believe one such claim may exist. It is that all the parties described in the complaint conspired under the color of state law to subject Buckey to the hardships and injuries which she suffered. We express no opinion on whether such a claim

ethically and professionally can be filed. We only indicate that it is a possibility.

This putative claim would not be addressed to a deprivation under color of state law of procedural due process, but rather would assert that due process was unconstitutionally denied "regardless of the purity of the procedures themselves." *Mann v. City of Tucson, Dept. of Police,* 782 F.2d 790, 798 (9th Cir.1986) (Sneed, J., concurring in the result). Because the claim would not be based in procedural due process, the question of the adequacy of post-deprivation remedies, so important in section 1983 cases involving only procedural due process deprivations, would be irrelevant. *Zinermon v. Burch,* 494 U.S. 113, 125-26, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990); *Sierra Lake Reserve v. City of Rocklin,* 938 F.2d 951, 957 (9th Cir.1991).

Under the putative claim, Buckey, like the plaintiff in *Bretz v. Kelman,* 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc),[3] would assert that the defendants, for their various reasons, conspired to attempt to send her to jail for child molestation, in the course of which great injury was suffered by her. The claim would not be that Buckey did not receive adequate procedural protections. Rather, as pointed out earlier, the claim would be that the procedures that ultimately established Buckey's innocence were made necessary only because of a wrongful conspiracy of entities and persons acting under the color of state law. The focus would be on a denial of equal protection of the laws, a wrong quite familiar to those in Congress who in 1866 enacted the first civil rights act and promulgated the Fourteenth Amendment. *See, e.g.,* Cong.Globe, 39th Cong., 1st Sess. 211 (1866) (describing civil rights bill S. 61: "the inhabitants of every race and color . . . shall have . . . full and equal benefit of all laws *and proceedings* for the

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[3]The court's analysis in *Bretz* is to some extent framed in the language of procedural due process, *see id.,* and the case has been interpreted as a procedural due process case, *see, e.g., Johnson v. Barker,* 799 F.2d at 1400. However, *Bretz* was decided without the benefit of *Zinermon's* three-prong typology of § 1983 due process claims, 494 U.S. at 125-26, 110 S.Ct. at 983, and it is most properly analyzed as a case involving the denial of equal protection or substantive due process.

security of persons and property, and shall be subject *to like punishment, pains, and penalties, and to none other. . . .*" (emphasis added)).

Buckey, to repeat was afforded ample due process at the state level. She received its full benefits resulting in her acquittal. The preliminary hearing and the trial itself cannot be faulted from a procedural point of view.

[8] Nor can Buckey successfully urge that she suffered injury because of so-called "defamation plus" by those acting under color of state law. *See Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Business and reputation losses alone do not constitute the "plus" that is required to transform an ordinary defamation claim into a section 1983 claim. *Cooper v. Dupnik,* 924 F.2d 1520, 1534 (9th Cir. 1991), *rev'd on other grounds,* 963 F.2d 1220 (9th Cir.1992) (en banc). To state a defamation-plus claim, Buckey must join a defamation claim to a recognizable section 1983 wrong such as the denial of equal protection and substantive due process here hypothesized.

We conclude that Buckey should be given the opportunity to amend her complaint. Nothing in this opinion is intended to foreclose any claim of immunity from liability under section 1983 that can be raised by any party to the amended complaint of the appellant.

REVERSED and REMANDED.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PEGGY MCMARTIN BUCKEY,
Plaintiff,

vs.

COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH, ROBERT PHILIBOSIAN, CHILDREN'S INSTITUTE INTERNATIONAL, KATHLEEN "KEE" MACFARLANE, CAPITAL CITIES/ABC, INC., and WAYNE T. SATZ,
Defendants.

CASE NO. CV 90 0293 RG (GHKx)

ORDER

On August 6, 1990, in Courtroom 16 in the above-entitled court, the Motions to Dismiss Plaintiff's Complaint pursuant to the Federal Rules of Civil Procedure, Rule 12(b)(6), filed by Defendants COUNTY OF LOS ANGELES and ROBERT PHILIBO-

OSIAN, CITY OF MANHATTAN BEACH, CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MACFARLANE, and CAPITAL CITIES/ABC, INC., came on regularly for hearing.

Appearing for Plaintiff PEGGY MCMARTIN BUCKEY was William H. Waysman. Appearing for Defendants COUNTY OF LOS ANGELES and ROBERT PHILIBOSIAN was De Witt W. Clinton, County Counsel, by Robert H. Granbo, Deputy County Counsel, and John A. Daly of Chase, Rotchford, Drukker & Bogust. Appearing for Defendant CITY OF MANHATTAN BEACH was David D. Lawrence of Cotkin, Collins and Franscell. Appearing for Defendants CAPITAL CITIES/ABC, INC. was Bradley S. Phillips and Robert N. Treiman of Munger, Tolles and Olson. Appearing for Defendants CHILDREN'S INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MACFARLANE was Lisa M. Jacobsen of O'Melveny and Meyers. There were no other appearances.

After consideration of the moving papers, the oppositions thereto, the replies to the oppositions, and oral argument of counsel, the Court orders as follows:

1. Plaintiff's claim for Violation of Civil Rights under 42 U.S.C. Section 1983 is dismissed with prejudice. The Plaintiff has not stated a claim, and there is no way that the Plaintiff can state a claim that her constitutionally protected rights were violated by any of the moving Defendants.

2. Plaintiff's state claims for Common Law Conspiracy, Malicious Prosecution, and Defamation are dismissed without prejudice as there is no longer a federal claim to which they may be appended.

IT IS SO ORDERED.

DATED: September 27, 1990

RICHARD A. GADBOIS, JR.
United States District Judge

FILED
OCT 29 1992
OFFICE OF THE CLERK

Nos. 92-560 and 92-628

In The

Supreme Court of the United States

October Term, 1992

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILOBOSIAN; CAPITAL CITIES/ABC, INC.; WAYNE T. SATZ; CHILDREN'S INSTITUTE INTERNATIONAL AND KATHLEEN "KEE" MACFARLANE,

Petitioners,

vs.

PEGGY MCMARTIN BUCKEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision involves a ruling on the relationship between common law malicious prosecution and 42 U.S.C. § 1983?

2. Whether the Ninth Circuit's decision states that Respondent in fact has both substantive due process and equal protection claims?

3. Whether parties who had no privity to a prior criminal proceeding have standing to assert it as a basis for a collateral estoppel defense in a subsequent civil suit?

PARTIES TO PROCEEDINGS

Two separate petitions for Certiorari were filed, No. 92-560 by Petitioners COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH and ROBERT PHILOBOSIAN; and No. 92-628 by CAPITAL CITIES/ABC, INC., WAYNE T. SATZ, CHILDRENS INSTITUTE INTERNATIONAL and KATHLEEN "KEE" MACFARLANE. Plaintiff PEGGY MCMARTIN BUCKEY responds to both petitions herein.

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II. SUPREME COURT REVIEW OF THIS CASE IS UNNECESSARY BECAUSE THE 'PRIVATE' PETITIONERS HAVE MISCONSTRUED THE NINTH CIRCUIT OPINION REGARDING DUE PROCESS AND EQUAL PROTECTION 5

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RESTATEMENT OF THE CASE

The Complaint in this action was filed by Respondent PEGGY MCMARTIN BUCKEY in the U.S. District Court, Central District of California on January 19, 1990, following one of the most notorious and longest criminal preliminary hearings in history.

The federal claim alleged in the first count arose under 42 U.S.C. § 1983 for breach of civil rights, and the remaining counts were pendent state law claims for common law conspiracy, defamation and malicious prosecution against some or all Petitioners COUNTY OF LOS ANGELES, CITY OF MANHATTAN BEACH, former Los Angeles County District Attorney ROBERT PHILOBOSIAN ("PHILOBOSIAN"), CHILDREN'S INSTITUTE INTERNATIONAL ("CII"), KATHLEEN "KEE" MACFARLANE ("MACFARLANE"), CAPITAL CITIES/ABC, INC. ("ABC"), AND WAYNE T. SATZ ("SATZ").

In substance, the complaint alleged a loose-knit conspiracy among the public and private party defendants to investigate, prosecute and convict BUCKEY on charges she molested numerous children at the Virginia McMartin Preschool she co-owned with her mother, in violation of BUCKEY's rights under state and federal constitutions and laws for the mutual advantage of Petitioners, **e.g.** PHILOBOSIAN, an appointed District Attorney who needed an election issue; CII employee MACFARLANE, the child abuse interviewer for the public entities and SATZ, an ABC reporter who "broke" the story on the McMartin Preschool, who had an ongoing secret romance with MACFARLANE which was not disclosed until late in the proceedings.

On August 6, 1990 Petitioners (except SATZ) moved to dismiss the complaint and the District Court granted the motion without leave to amend on September 28, 1990. SATZ appeared later and joined the appeal by stipulation. On appeal in the Ninth Circuit, the trial court was overruled and Respondent was granted leave to amend her complaint to allege an equal protection claim.

On March 4, 1992 Petitioners filed for a rehearing or rehearing en banc with the Ninth Circuit which was denied on July 1, 1992, and at that time the Ninth Circuit amended its prior decision solely to note that the decision did not preclude any immunity claims.

SUMMARY OF ARGUMENT

The two Petitions for Certiorari responded to here contain fundamental analytical errors which should preclude granting the Petitions. First, they virtually ignore the precise holding of the 9th Circuit for which review is sought, that Petitioner should have at least one opportunity to amend her civil rights complaint to attempt to state a federal claim based upon existing allegations of outrageous concerted abuses by public and private parties which, if true, look like a nascent claim under the 14th Amendment not yet adequately pleaded. *Leave to amend once is all that was decided below.*

Second, Petitioners ignore the significant facts which distinguish this case from all others cited by Petitioners to support their position. The complaint is not in any sense limited to what Petitioners did to Respondent *prior* to the probable cause finding at her preliminary hearing.

For example, she pleaded that the conspiracy continued *after* she was bound over for trial, such as through a trumped-up publicity campaign, and the fact that *after* leaving office, PHILIBOSIAN continued to support the conspiracy in a defamatory press conference. (Complaint, ¶¶ 24, 26 and 38)

RESPONDENT'S ARGUMENTS FOR DENYING THE PETITION

I. THE ISSUES RAISED BY PETITIONERS CITY, COUNTY AND PHILOBOSIAN WERE NOT EXPRESSLY RULED ON BY THE NINTH CIRCUIT AND ARE NOT NECESSARY TO THE RESULT REACHED BELOW

The public Petitioners base their claim for review solely on the argument that the Ninth Circuit in *Buckey* upheld common law, malicious prosecution as the basis for BUCKEY's § 1983 cause of action, and that the Circuits are supposedly split on whether such a basis for a § 1983 case exists. That is an unduly subtle and intuitive reading of the complaint (which has a separate pendent claim for malicious prosecution) and the opinion. Nowhere in the Ninth Circuit opinion does it state or imply that its basis is malicious prosecution. Its basis is rather a course of conspiratorial conduct amounting to a substantive due process violation. Moreover, the complaint clearly goes beyond the elements of malicious prosecution: (1) lack of probable cause, (2) malice and (3) favorable termination. In the *Buckey* case, the "violation" is what went on before, during, after and even outside the scope of the prosecution. If BUCKEY's § 1983 theory

is correct, she would have a civil rights claim even if she had been convicted, akin to a prisoner's claim that he was beaten in jail which is not barred because there was probable cause to arrest or prosecute.

The public Petitioners' position is also somewhat deceptive in its reliance on state and federal precedents to support their malicious prosecution argument. For example, they cite *Guenther v. Holmgreen*, 738 F.2d 879 (7th Cir. 1984), **cert. denied**, 469 U.S. 1212 (1985), to support the proposition that a probable cause finding at a preliminary hearing precludes subsequent relitigation of that issue, but omit the later opinion from the same court which makes it clear that supposed rule does not apply in a case like BUCKEY'S with quite different and specific allegations.

> "We agree with the district court that the preliminary hearing determination does not preclude relitigation of the probable cause issue. The preliminary hearing concerned the sufficiency of the evidence to establish probable cause. Since the instant claim is more accurately characterized as a challenge to the integrity of the evidence than to its sufficiency, identity of the issues is lacking. . . . In this case Schertz does not claim that the defendants concealed or misrepresented facts actually known to them; therefore, the existence of probable cause bars plaintiff's § 1983 claim." *Schertz v. Waupaca County*, 875 F.2d 578, 581-582 (7th Cir. 1989)

Here, of course, BUCKEY makes precisely the claims that Schertz failed to make, and the prior probable cause finding does not bar her case. It also might be noted that

California law on the collateral estoppel of criminal probable cause on malicious prosection is entirely consistent with this result, starting with *Jaffe v. Stone*, 18 Cal.2d 146 (1941), continuing through with *McGowan v. City of San Diego*, 208 Cal.App.3d 890, 895 (1989), *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal.3d 863, 877 (1989) and most recently *Cook v. Farmers Group, Inc.*, 1 Cal.App.4th 163, 167 (1992).

II. SUPREME COURT REVIEW OF THIS CASE IS UNNECESSARY BECAUSE THE 'PRIVATE' PETITIONERS HAVE MISCONSTRUED THE NINTH CIRCUIT OPINION REGARDING DUE PROCESS AND EQUAL PROTECTION

The Ninth Circuit panel made no evaluation as to the validity of Respondent's equal protection or due process claim, and explicitly stated, "The only issue we confront is whether we should remand to permit Buckey to amend her pleadings." *Buckey v. County of Los Angeles*, 957 F.2d 652, 654 (9th Cir. 1992). The court concluded only that under existing federal law, an amendment of the pleadings was permissible. The court specifically noted no opinion was offered as to whether such a claim could ethically and professionally be filed, only indicating that such a claim was a possibility. *Id.* In fact, the court states the focus of the claim would not be due process violations, but rather equal protection claims, because the procedural remedies which absolved Respondent of criminal liability were made necessary "only because of a wrongful conspiracy of entities and persons acting under the color of state law." *Id.* at 655.

Despite Petitioners' claims to the contrary, liability for these private entities may exist under an equal protection claim where these parties had acted as agents of the state. "Liability must be established by showing that the defendants either personally participated in a deprivation of the plaintiff's rights or caused such a deprivation to occur." [citations omitted] *Bouvia v. County of Los Angeles*, 195 Cal.App.3d 1075, 1087 (1987). The liability of a private party under § 1983 may exist for acting "in concert with" a government, even when the government is immune, **See** *Dennis v. Sparks*, 449 U.S. 24, 27-29 (1980); or if the private parties willfully participate in government denial of constitutional rights. *Arnold v. IBM*, 537 F.2d 1350 (9th Cir. 1981). Private parties can be held to have "conspired" with the state and therefore be subject to § 1983 liability, if the government failed to exercise independent judgment. **See** *Grammemos v. Jewel Companies, Inc.*, 797 F.2d 432, 435-436 (7th Cir. 1986), **cert. denied**, 1075 S.Ct. 1952 (1987).

As stated above, the state delegated its investigatorial duties to CII and MACFARLANE. Consequently, CII and MACFARLANE became state actors whose endeavors have created equal protection liability for themselves as well as the state. Ironically, the McMartin Preschool case has become the national model for how *not* to conduct a child sexual abuse investigation. **See** ABA Journal, July, 1992 at p.36.

Additionally, SATZ and ABC were willing and active participants in the conspiracy and assisted in the deprivation of Respondent's rights by knowingly broadcasting false information to boost news program ratings and to promote the individual careers of both SATZ and his

clandestine paramour MACFARLANE. (Complaint ¶¶ 26 and 29)

III. COLLATERAL ESTOPPEL CANNOT BE ASSERTED BECAUSE THE 'PRIVATE' PARTIES LACK STANDING TO DO SO

To argue collateral estoppel in a civil proceeding, regarding issues determined at a prior criminal proceeding, the prior action must have involved the same parties or their privies. *McGowan v. City of San Diego*, 208 Cal.App.3d 890 (1989). Since ABC and SATZ were not parties to the criminal proceeding, they lack standing to assert collateral estoppel in this civil matter.

Moreover, CII and MACFARLANE cannot have it both ways. If they are independent private actors, they are precluded for lack of standing from asserting collateral estoppel. But if CII and MACFARLANE are parties to the criminal proceeding (and therefore state actors) for purposes of collateral estoppel, then they must also be state actors for purposes of equal protection. Moreover, if parties were permitted to argue collateral estoppel in civil proceedings regarding all issues surrounding a criminal prosecution, then virtually any claim for malicious prosecution would be precluded.

IV. CONCLUSION

The Petitioners are wide of the mark for review by this Court. Indeed, the Petitioners make much ado about not very much. All that Mrs. BUCKEY achieved after great effort and expense, was leave to amend. There is no

far reaching precedent here. Respondent deserves the opportunity to replead her claims against the powers that be who destroyed her entire world.

October 28, 1992

Respectfully submitted,

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A LAW CORPORATION

LAW OFFICES OF
WILLIAM H. WAYSMAN

By WILLIAM H. WAYSMAN

APPENDIX

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Attorneys for Plaintiff
PEGGY MCMARTIN BUCKEY

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PEGGY MCMARTIN BUCKEY,

Plaintiff,

vs.

COUNTY OF LOS ANGELES; CITY OF MANHATTAN BEACH; ROBERT PHILOBOSIAN; CHILDREN'S INSTITUTE INTERNATIONAL; KATHLEEN "KEE" MACFARLANE; CAPITAL CITIES/ABC, INC.; and WAYNE T. SATZ;

Defendants.

_____/

CIV. No. 90 0293 RG(GHKX)

COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS AND OTHER CLAIMS

(Filed Jan. 19, 1990)

JURY TRIAL DEMANDED

Plaintiff alleges:

I. JURISDICTION AND VENUE

1. This action arises under the Federal Civil Rights Act of 1871, 42 U.S.C. Section 1983, and the principles of

pendent jurisdiction. This court has jurisdiction pursuant to 28 U.S.C. Sections 1331, 1332 and 1343.

2. Plaintiff is a California citizen residing in this district, and venue is proper in this District because each of the public entity defendants is located entirely within this District; plaintiff is informed and believes that each of the individual defendants is and was at all times here relevant a resident of this District; and substantially all of the events alleged below occurred within this district. Defendant CAPITAL CITIES/ABC, INC. is a foreign corporation which is incorporated in and has its principal place of business in a state other than California, but is doing business in this district as "ABC Television."

3. The amount in controversy exceeds $50,000.00

II. PRELIMINARY ALLEGATIONS COMMON TO ALL COUNTS

4. Plaintiff was until the events herein alleged began in 1983 the co-owner of and a teacher at the Virginia McMartin Preschool ("Preschool") in Manhattan Beach, California. The Preschool and plaintiff enjoyed unblemished reputations and prestige for providing education and care for preschool aged children, and were duly licensed to do so.

5. Plaintiff is informed and believes that at some time in 1983, Judy Johnson ("Johnson"), a parent of a former Preschool student, told the Police Department of defendant CITY OF MANHATTAN BEACH ("CITY") that her son had been sexually molested at the Perschool at some unspecified time in the past. Plaintiff is informed and

believes that the police department had received prior complaints from the same parent which had turned out to be false and fabricated, and that they further knew that Johnson recently had been released from a mental health institution where she had been confined for paranoia and other mental and emotional infirmities, but the police nonetheless began a purported child abuse investigation without any attempt to inform the Preschool or the teaches of the allegations against them. The initial efforts of the police in this regard included sending a letter to parents of all Preschool children advising them that their children might have been molested at the Preschool, which caused panic and dismay among the parents and substantial injuries to the reputation of plaintiff and the Preschool by the reckless implications of misconduct.

6. At some point after CITY's purported child abuse investigation began, but prior to the indictments identified below, CITY received the active assistance of Defendant COUNTY OF LOS ANGELES ("COUNTY"), a political subdivision of the State of California, through COUNTY's Sheriff's Department and District Attorney's Office, who like CITY did not conduct their own or an independent investigation of the allegations of child abuse.

7. Plaintiff is further informed and believes that at the suggestion of COUNTY, CITY retained defendant CHILDREN'S INSTITUTE INTERNATIONAL ("CII"), formerly Big Sisters' League, to interview, examine, interrogate and evaluate the alleged victims of child abuse, and report initially to CITY, and later after criminal proceedings had been initiated, to COUNTY, whether child abuse had occurred and who the perpetrators were. Plaintiff is

informed and believes that CII in turn, by and through its duly authorized officers and agents, delegated the aforesaid tasks to its officials Astrid Heger ("Heger") and Bruce Woodling ("Woodling"), who in turn delegated actual work with children to defendant KATHLEEN "KEE" MACFARLANE ("MACFARLANE"), and others not now specifically known to plaintiff.

8. Plaintiff is informed and believes that CII is a California non-profit corporation which holds itself out to the public as an independent, professional and objective organization that is expert at the task of assessing whether in fact child abuse has occurred, the nature thereof and the identity of the perpetrators, as well as conducting treatment and therapy. Plaintiff is further informed and believes that the employees of COUNTY and CITY responsible respectively for recommending and retaining CII were not adequately trained or supervised: (1) to determine whether such a reference was necessary or desirable, (2) to determine the qualifications of CII or its agents and employees to perform the duties delegated to them, or (3) to evaluate the information produced by CII. The delegation of substantially all investigatory duties to CII and failure to supervise CII by CITY and later COUNTY was in violation of published manuals and procedures which were in accordance with mandatory State of California policy for such investigations under Penal Code Sections 13823.5 and 11166 *et seq.*, as in effect at the time, adopted for their direction and control by the relevant state authorities and constituting a rule of law as defined in Government Code Section 811.6. On the other hand, the manner of over-delegation and failure to supervise CII were pursuant to governmental policies of CITY

and later COUNTY to pursue this child abuse investigation in a manner which disregarded some state policies and plaintiff's rights, for example on confidentiality, for the political benefit of CITY, COUNTY and their officials (especially defendant ROBERT PHILOBOSIAN, who was running for election as District Attorney at the time, having been previously appointed to that post) through favorable publicity and media attention, while at the same time purporting to act pursuant to state law.

9. Subsequent to the attempted performance of its delegated task, but before the indictments identified below, CII reported to CITY and COUNTY its conclusions that numerous acts of child abuse had occurred at the Preschool, and that plaintiff, among others, was a perpetrator or probable perpetrator thereof, although CII had no contact with plaintiff nor specific knowledge about plaintiff at the time such report was made; and, CII had violated substantially all standards for interviewing alleged child abuse victims, including without limitation, unduly leading interrogation, coaching of statements, and intimidating children into making false and fantasized charges against plaintiff. Plaintiff is further informed and believes that CII and its agents and employees, including without limitation MACFARLANE, engaged in such improper activities because it was to their economic, personal and professional advantage to produce reports leading to indictments of plaintiff and others, as well as favorable publicity about themselves. Plaintiff is further informed and believes that CII was on the verge of closing its operations because of its financial instability at the time the Preschool investigation was delegated to it,

which motivated CII to "uncover" non-existent child abuse in order to perpetuate itself.

10. Plaintiff is informed and believes that some time in 1984, after CII's reports to CITY and COUNTY, defendant ROBERT PHILOBOSIAN ("PHILOBOSIAN"), the duly appointed and acting District Attorney of Los Angeles County and a candidate for election to that office, decided to present to the Grand Jury the name of plaintiff, among others, for indictment for the alleged child abuse at Preschool. Plaintiff is further informed and believes that PHILOBOSIAN based his decision upon the recommendations of CITY, the reports of CII, and MACFARLANE and the advice of agents and employees of CITY and COUNTY (none of whom had in fact conducted an actual or independent investigation of the alleged child abuse), and on his assessment of the value of the publicity attendant to an indictment under the circumstances present for his ongoing political campaign.

11. Subsequently in 1984, the Grand Jury indicted plaintiff and others on numerous counts of child abuse and related offenses in connection with the Preschool, based upon facts selected for presentation to the Grand Jury by PHILOBOSIAN and those acting under his direction and control, and after the suppression and mishandling of evidence that he, CITY and COUNTY knew then would have been exculpatory of plaintiff, including without limitation, the truth with respect to the initial complaining witness described above in paragraph 5.

12. Thereafter, plaintiff was subjected to arrest and booking procedures, as well as further purported investigation throughout the period 1984 to 1986, re-arrest, and

all amid tremendous amounts of publicity, official statements and pronouncements about plaintiff's guilt for child molestations, which were generated by CITY, COUNTY, PHILOBOSIAN, CII and others acting in concert with them and which continued unabated throughout the criminal proceedings against plaintiff up to 1990.

13. Plaintiff was subjected to additional pre-trial proceedings and eighteen (18) months of preliminary hearings which terminated in 1986, but did not have the opportunity therein to litigate the issues raised in this complaint because of the acts of defendants in concealing evidence of their own misconduct as alleged herein, which included fabricating evidence against plaintiff and suppressing evidence in her favor.

14. At the conclusion of the preliminary hearing, plaintiff was bound over for trial and did not at that time know the nature of the misconduct of defendants in fabricating evidence, suppressing evidence and suborning perjury against her, although she maintained her innocence of the charges.

15. Each defendant is believed to have been the agent of each of the other defendants and acting within the course and scope of such agency with respect to the matters herein alleged, except where the contrary is specifically pleaded.

16. Within 100 days after her acquittal and the dismissal of the criminal charges against plaintiff, plaintiff filed claims with COUNTY and CITY alleging essentially the same facts as alleged throughout this complaint, claiming continuing tortious conduct by COUNTY and CITY from 1983 through 1990, under the California Tort Claims Act,

Government Code Sections 911 et seq., and those claims have been rejected or will be rejected or deemed rejected.

17. Plaintiff was disabled from filing an earlier claim by the circumstances of the criminal prosecution, the publicity, the damages suffered and the combined acts of defendants to prevent plaintiff from ascertaining the truth about such defendants' conduct and being able to take action thereon at least up until the conclusion of the criminal case against her, under a totality of circumstances which would have in any event rendered any additional claim filing an idle act, and prevented plaintiff's adequate knowledge of the claim. Plaintiff further alleges that any impediment to this action based on alleged failure to comply with government claims presentation requirements is invalid on the ground that such procedures as applied deny plaintiff equal protection of the laws and due process, especially under the 5th Amendment to the United States Constitution's prohibition against requiring a criminal defendant to engage in self-incrimination.

III. FIRST COUNT VIOLATION OF CIVIL RIGHTS UNDER 42 U.S.C. 1983

18. Paragraphs 1 through 17 above are incorporated in this paragraph by this reference; and plaintiff alleges as follows against each of the defendants.

19. This cause of action arises under 42 U.S.C. Section 1983, and seeks to hold defendants, who, plaintiff is informed and believes, at all times here relevant were persons acting under color of state law or in concert with persons acting under color of state law, responsible for

their deprivation of plaintiff's rights, privileges and immunities secured by the statutes and Constitution of the United States. Defendants' acts were either for the intentional purpose of violating plaintiff's rights, or with deliberate indifference toward such rights, and were pursuant to governmental policies of CITY and COUNTY regarding handling child abuse cases in a manner which disregarded the rights of the putative defendant and maximized public exposure and publicity, especially as those policies were applied to plaintiff. The specific facts of the policy upon which this cause of action is based were not discovered until within one year preceding the filing of this action, and could not have been earlier discovered despite reasonable diligence because of defendants' acts oppressing plaintiff and suppressing evidence of their own misconduct.

20. Plaintiff is informed and believes that the specific misconduct of defendants CITY, COUNTY and PHILOBOSIAN at issue, joined in by the other defendants, includes without limitation, the following which occurred and injured plaintiff continuously at virtually certain that such injuries would occur:

(1) failure to adequately train and supervise employees and delegatees, including CTIY's Police Department and MACFARLANE (who had no relevant academic, professional or technical license or credentials), with respect to child abuse and molestation investigations;

(2) issuing false and misleading statements to the news media regarding the progress of the investigation

and trial, and regarding the state of the supposed evidence against plaintiff for the purpose of enhancing defendants' public image and gaining unfair advantage over plaintiff at trial; and for similar purposes, causing information subject to court protective orders to be leaked to the media;

(3) attempting to intimidate plaintiff's co-defendants in the criminal proceeding so as to produce from them a false confession implicating plaintiff; *e.g.*, causing co-defendant Babette Spitler's children to be arrested, removed from the care of relatives and detained incommunicado as leverage for a plea bargain and testimony from Spitler implicating plaintiff;

(4) fabricating evidence against plaintiff, suppressing evidence in favor of plaintiff, and suborning perjury and/or perjury; and,

(5) interfering with plaintiff's ability to practice her profession as a teacher, and her ability to reestablish her business by publishing and re-publishing, for the purposes of such interference, to the general public and administrative licensing bodies within a year preceding the filing of this action, the allegations against plaintiff of child abuse which defendants knew to be false.

21. The rights, immunities and privileges of plaintiff violated by defendants and each of them include without limitation, the rights to privacy, due process, equal protection and a fair trial secured by the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Article I, Section 7 of the California Constitution.

22. Plaintiff was injured in her rights and feelings, and lost employment and income by the aforesaid acts and omissions of duty by defendants and each of them, and was deprived of her preschool business for the same reason, incurring damages in an amount in excess of $1 million.

IV. SECOND COUNT COMMON LAW CONSPIRACY – AGAINST ALL DEFENDANTS

23. Paragraphs 1 through 17, and 19 through 22 above are incorporated in this paragraph by this reference, and plaintiff further alleges against all defendants on information and belief:

24. In late 1983 or early 1984, prior to any action taken by CITY or COUNTY with respect to initiation of a criminal prosecution of plaintiff, persons employed by CITY, COUNTY and CII, including MACFARLANE, and other individuals not so employed, believed to include CAPITAL CITIES/ABC, INC. reporter defendant WAYNE T. SATZ, entered into an informal agreement among themselves to conduct and publicize an investigation of allegations of child abuse at the McMartin Preschool in such a way as to predetermine the outcome of the investigation of those allegations and produce indictments of plaintiff and others, even though the defendants and others involved knew those allegations were false and that they would be depriving plaintiff of her civil rights such as the right to a fair trial. The defendants joined in and agreed to the conspiracy and its purposes as it proceeded and prior to indictment of plaintiff, including defendant PHILOBOSIAN, and each continued to actively participate

therein at least up until early 1986; each continued to passively support the conspiracy through failure to disclose its nature and existence and acceptance of the economic and professional benefits therefrom through 1990; and, CITY, COUNTY, CII and MACFARLANE actively participated in furthering the conspiracy at least up through 1990 to plaintiff's acquittal.

25. Each of the defendants named in this cause of action agreed, conspired and acted for the purpose of violating plaintiff's civil rights as set forth in the Constitution and laws of the United States and the State of California, including without limitation, the 4th, 5th and 14th Amendments to the U.S. Constitution, 42 U.S.C. Section 1983, and Article I, Section 7 of the California Constitution, and related laws which guaranteed plaintiff due process, equal protection and a fair trial on the criminal charges defendants caused to be filed against her. Each defendant participated in the conspiracy for personal, professional, economic or political gain and did so gain from plaintiff's injuries.

26. The specific misconduct engaged in by each defendant in pursuit of the conspiracy included, without limitation, conspiring to and fabricating evidence against plaintiff, suppressing evidence favorable to plaintiff, suborning perjury and/or committing perjury while testifying, and making knowingly false and misleading public statements and press releases so as to prejudice plaintiff and present her in a false light as a depraved person unfit to be near small children. In addition, each defendant agreed with each other defendant to conduct and they did jointly conduct the investigation into child abuse at Preschool and subsequent prosecution in a manner that

recklessly disregarded and had deliberate indifference toward the rights and feelings of plaintiff, by excessive publicity, overdelegation of authority and responsibility for the purported investigation and interviews of the child witnesses, lack of supervision of inadequately trained personnel, failure to follow established procedures for protection of the alleged victims and perpetrators, encouraging parents to make false or exaggerated claims of child abuse in exchange for promises of public funds for crime victims, and other means that made injury to plaintiff's rights virtually certain.

27. The agreement and overt acts of the defendants were not protected by privilege or immunity because they commenced prior to initiation of any prosecution, and included excessive publicity generated by false and misleading public announcements by each of the defendants throughout the investigation and prosecution, with the specific intent to hide defendants' own misconduct and to deprive plaintiff of the right to a fair trial and to resume her chosen profession.

28. The facts regarding the conspiracy alleged were discovered within one year preceding the filing of this action, and could not have been earlier discovered despite reasonable diligence because of the efforts and success of defendants in manipulating and controlling the information available to plaintiff and the public abut the evidence for and against plaintiff, as well as defendants' role with respect thereto.

29. The conspiracy described above injured plaintiff as alleged in paragraph 22. Plaintiff further alleges against defendants other than CITY and COUNTY that in doing

the acts described above, each defendant acted with malice in intending to cause plaintiff's injuries, and knew and observed the extent of her emotional and other injuries from their acts and omissions of duty; each defendant's conduct was despicable, particularly given their public and professional positions and duties; their acts were wilful and with a conscious disregard and indifference for plaintiff's rights and feelings, and subjected her to cruel and unjust hardship, pain, shock, nausea and humiliation, entitling her to exemplary damages according to proof for sake of example and by way of punishing each defendant other than CITY and COUNTY.

V. THIRD COUNT MALICIOUS PROSECUTION – AGAINST CAPITAL CITIES/ABC, INC., WAYNE T. SATZ, CII and KATHLEEN MACFARLANE

30. Paragraphs 1 through 17, and 24 through 26, are incorporated in this paragraph by this reference, and plaintiff alleges as follows against all defendants except CITY OF MANHATTAN BEACH, COUNTY OF LOS ANGELES and ROBERT PHILOBOSIAN:

31. Plaintiff is informed and believes that each defendant was instrumental in procuring the prosecution of plaintiff because each had the ability to control the flow of information regarding the investigation to the public, the press, the police, the prosecutors, the grand jury and the courts and each was familiar with the facts regarding plaintiff's innocence, the falsity of the allegations against her, and the methods used to obtain incriminating statements from the alleged victims of child abuse. Each defendant actively assisted in presenting or suppressing

such information by either committing perjury, suborning perjury, fabricating information, hiding it, selectively leaking it to the press or publicizing it so as to produce an indictment and trial of plaintiff for child molestation, even though each defendant knew that there was in fact no probable cause to believe defendant guilty of such charges and had no honest or reasonable good faith belief in the existence of probable cause.

32. Each defendant acted maliciously out of motives of personal, professional and/or economic gain, as appropriate to whether it was an individual or an organization, at the expense of plaintiff's injuries and with the knowledge and intent that plaintiff would be injured in her reputation, feelings and economic welfare. Further, defendants CII and CAPITAL CITIES/ABC, INC. knew or should have known of each of the wrongful activities of their respective employees, KATHLEEN "KEE" MACFARLANE and WAYNE T. SATZ as herein alleged, but failed to take any action to prevent or restrain them from causing harm to plaintiff, accepted economic benefits from their activities as described herein, and by action and inaction ratified and approved their wrongful conduct.

33. Notwithstanding the prosecution maliciously procured by defendants, the criminal proceedings were terminated in plaintiff's favor in early 1990 by acquittal of all charges.

34. As a result of such malicious prosecution, plaintiff has suffered anguish, anger, shock, public disgrace and humiliation, loss of employment and income and incurred attorney's fees and court costs in an amount in

excess of $1 million. In addition, plaintiff seeks exemplary damages for each defendant's malicious, intentional, deliberate, wilful and despicable disregard of her rights and feelings, for sake of example and by way of punishing defendants.

VI. FOURTH COUNT DEFAMATION - AGAINST ALL DEFENDANTS

35. Paragraphs 1 through 17, 24 and 26 are incorporated in this paragraph by this reference, and plaintiff alleges as follows against all defendants as follows:

36. This action is not barred by Civil Code Section 48.7a because the prosecution of plaintiff for child abuse terminated before this action was filed; nor, because of that section could this action have been filed prior to dismissal of such charges. This action is not barred by the provisions of Penal Code Section 11166 et seq. with respect to any defendant connected with CII or claiming an immunity based on agency or employment by CII because the actions alleged herein were not reports of child abuse but investigative and other non-reporting activities. In addition, in 1986, CII through a spokesperson publically denied on a nationwide television broadcast that its activities challenged herein had been conducted pursuant to or for the purposes of producing a report protected under that [sic] those statutes; and further, the allegations herein include publication of the information which those statutes are designed to keep confidential.

37. Plaintiff is informed and believes that each of the defendants joined in and republished to numerous persons in this county each of the defamatory statements herein alleged, as well as others not now specifically known to plaintiff, and continued to do so from some time in 1983 or 1984 prior to the bringing of the criminal charges of alleged child abuse against plaintiff, up to and including times after the criminal charges were formally dismissed against plaintiff in 1990. Plaintiff is informed and believes that such false and defamatory statements were made or joined in both within the course and scope of each individual defendant's employment and outside such course and scope, for example, in connection with administrative proceedings concerning plaintiff's professional credentials after termination of the criminal proceedings. Plaintiff is further informed and believes that defendant PHILOBOSIAN made such statements both within and outside the scope of his office as District Attorney and made some such statements purely for personal, professional and political advantage in 1986 after he had left that office.

38. Plaintiff is informed and believes that the defamatory statements alleged consisted of both written and oral statements from each of the defendants which stated in essence that plaintiff had been involved in illegal sexual activity with numerous small children at Preschool for an extended period of time, was involved in child abuse, child molestation, and child pornography, and violated sections of the Penal Code forbidding such activities; that plaintiff had committed various sexual assaults on children, threatened and intimidated them; participated in Satanic rituals with children, mutilated dead and live

animals; and committed other disgusting and repulsive sexual acts. Plaintiff is informed and believes that each defendant falsely stated to the public that numerous children had specifically identified plaintiff as a perpetrator of the foregoing offenses, including statements by defendants CAPITAL CITIES/ABC, INC. and/or WAYNE T. SATZ on multiple, sometimes daily, nationwide media broadcasts from 1984-1990. Plaintiff is informed and believes that defendant CAPITAL CITIES/ABC, INC. has possession and control of copies of each such defamatory broadcast by itself and WAYNE T. SATZ. Each of the defendants either directly participated in, or assisted others in preparing for or setting up and choreographing interviews and interrogations of alleged victims or witnesses and others who were deliberately questioned in such a way as to expressly or impliedly accuse plaintiff of involvement in heinous sexual conduct related to children, even though the actual interrogators and the other assisting defendants knew such allegations were the false and fabricated product of the interrogation methods.

39. The publications were made in this county, of and concerning plaintiff and were so understood by those who heard and read them from 1983 to 1990, including plaintiff's friends, neighbors and professional colleagues, and parents of students who attended the Preschool.

40. All of the publications, accusations and innuendo were false, and false as they pertained to plaintiff, as to whom the truth known to defendants was that she was a competent and caring professional who have never harmed or threatened to harm a child. Plaintiff took all reasonable steps within her ability to counteract such defamatory statements, including public demands for

retraction, withdrawal and correction which are herewith reasserted and have previously been asserted in writing, and any further requirement for mitigation is excused by the circumstances attending the extended criminal prosecution of plaintiff and defendants' oppressive conduct toward her.

41. The acts of each defendant caused plaintiff a loss of reputation, shame, mortification and shock, and required her to expend funds to retain attorneys to defend and advise her with regard to her rights, all such damages in an amount in excess of this court's jurisdictional minimum. Plaintiff also seeks special damages against defendants because their acts were specifically intended to cause and did cause the temporary or permanent destruction of plaintiff's ability to carry out her business or profession; caused loss of employment and income for the years 1983 through 1990 and continuing in an amount in excess of this court's jurisdictional minimum.

42. The publications by defendants from 1983 or 1984 through 1990 were malicious and made from ill-will toward plaintiff, with a conscious disregard for plaintiff's rights and feelings so as to capitalize at plaintiff's expense and for defendants' personal, political, professional and economic benefit on the public sentiment against child abusers and to satisfy defendants' selfish desires for notoriety and fame. Plaintiff therefore seeks punitive damages against defendants other than COUNTY for sake of example and by way of punishing each of such defendants.

PRAYER

THEREFORE, Plaintiff prays for judgment against Defendants and each of them as follows:

1. General damages of $1 million and according to proof on the First, Second, Third and Fourth Counts;

2. Attorneys' fees on the First and Third Counts according to proof;

3. Special damages according to proof on the Fourth count;

4. Prejudgment interest on damages as allowed by law;

5. Such other and further relief as the court deems proper.

Dated: January 19, 1990

JAMES H. DAVIS
A Law Corporation
By _____
JAMES A. QUINN
Attorneys for Plaintiff
PEGGY MCMARTIN BUCKEY

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury pursuant to Fed. Rules Civ. Pro., Rule 38(b).

Dated: January 19, 1990

JAMES H. DAVIS
A Law Corporation
By _____
JAMES A. QUINN
Attorneys for Plaintiff